BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN A. TYLER Claimant VS. **TRUGREEN CHEMLAWN** Respondent AND **ZURICH AMERICAN INS. CO.** Insurance Carrier	)	Docket No. 1,056,652

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 16, 2011, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. William A. Wells, of Wichita, Kansas, appeared for claimant. Samantha N. Benjamin-House, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that although claimant deviated from his employment, the deviation was not so substantial as to remove claimant from the course of his employment. Accordingly, the ALJ found that claimant was injured while working for respondent and his injury arose out of and in the course of his employment. Respondent was ordered to pay claimant's outstanding medical bills incurred with Dr. Mark Dobyns, and Dr. Dobyns was authorized to be claimant's treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 29, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file. This Board Member did not consider the transcript of claimant's discovery deposition taken September 20, 2011, because it was not stipulated into the record by agreement of the parties and also was not considered by the ALJ.[1]

[1] See K.S.A. 44-555c(a).

ISSUES

Respondent argues that claimant's injury did not arise out of and in the course of his employment as it occurred while claimant was on a frolic and substantial deviation from his employment. Respondent further contends the ALJ exceeded her jurisdiction in granting claimant benefits.

Claimant argues returning home to pick up his cell phone was not a deviation of his employment as he used the cell phone in his employment. In the alternative, claimant contends the deviation was not of a sufficient nature as to constitute an abandonment of employment. Claimant further asks that the Board affirm the ALJ's order providing him with medical treatment.

The issues for the Board's review are:

(1) Did claimant suffer injury by an accident that arose out of and in the course of his employment with respondent?

(2) Did the ALJ exceed her jurisdiction in granting claimant medical benefits?

FINDINGS OF FACT

At the time of his injury, claimant was employed by respondent as a lawn technician. In addition to his duties of maintaining customer's lawns, he was required to speak with at least two potential clients per week in order to help the company grow. In addition to his job with respondent, claimant was the pastor of a small church.

On the morning of claimant's accident, March 10, 2011, he left his home and went to work, a distance of about eight miles. Once there, he put on his uniform, logged in and received his assignments for the day. He then got into the company truck and went back to his home because he had forgotten his cell phone. He stayed at his home only long enough to retrieve his cell phone and lock his house back up. He then proceeded to travel to Derby, Kansas, for his first assignment. However, as he went through an intersection a block or two from his home, he was broadsided by another vehicle. He suffered a right shoulder contusion, right rib contusion, right shoulder sprain, and lumbar sprain. Claimant estimated that approximately 30 minutes elapsed from the time he left work to return home and the time the accident occurred.

Claimant acknowledged that respondent had not provided him with a cell phone and that he had gone back home to pick up his personal cell phone. He also stated that if his family or a member of his congregation would call him, they would call him on his cell phone. He was not required by respondent to have a cell phone with him. The truck he was given to drive had a two-way radio which allowed him to communicate with respondent. However, claimant testified his personal cell phone contained names and

telephone numbers of clients and prospective clients and he had planned on using his cell phone that day to call a prospective customer whose number was in his cell phone. Claimant also testified that at times he would work in areas where respondent's two-way radio system did not work well and on those occasions respondent would call him on his cell phone. He stated that there had been a period of time when the radios were shut off and all the technicians were asked by respondent to give their phone numbers to the office, and that is how respondent contacted them until the radios were back up.

Tom Hand is respondent's general manager for the branch where claimant worked. Mr. Hand said that respondent communicated with its lawn technicians by two-way radio and by pen and paper. Respondent did not provide any of the lawn technicians with cell phones and does not require them to carry cell phones with them. Mr. Hand said respondent did not want the lawn technicians to carry cell phones because they are a driving distraction. If employees need to use a telephone, they are expected to use the land lines at the branch office.

Mr. Hand stated that claimant was expected to have one sale per week in the first five months of working for respondent and after that, claimant was expected to attain a sales revenue goal. Mr. Hand said telephones are available throughout the branch offices for use by the employees in making sales calls. However, he agreed a lawn technician would not have the company phones accessible to him if he were asked to return a call to a prospective client during a time he was in the field. In that case, Mr. Hand said the lawn technicians would generally have someone from the office call the prospective client.

Claimant testified that he no longer has right shoulder pain or rib pain, but he continues to have low back pain. He said Dr. Dobyns has recommended physical therapy, which claimant would like to undergo. Claimant stated that he is able to mow his own lawn and he still plays golf every now and then. He was terminated by respondent after the accident and was not working at the time of the preliminary hearing. He testified that he applied for a landscaping job with Wichita State University but was awaiting a callback from the university.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

In discussing deviation from employment, the Kansas Supreme Court stated In *Sumner*[5]:

> In Kansas, the deviation must be so substantial that the employee is deemed to have abandoned any business purpose.
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> > "A deviation from the employer's work generally consists of a personal or nonbusiness-related activity. The longer the deviation exists in time or the greater it varies from the normal business route or in purpose from the normal business objectives, the more likely that the deviation will be characterized as major. *In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose* and consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose." (Emphasis added.) *Kindel*, 258 Kan. at 284.

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[2] K.S.A. 2010 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] *Id.* at 278.

[5] *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 290-91, 144 P.3d 668 (2006), quoting *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

"[When] the employee's traveling upon public roadways [is] an integral or necessary part of the employment . . . [s]uch travel has been described as an intrinsic part of the job."[6] "A trip which serves both a personal purpose and a business purpose . . . is often referred to as a 'dual purpose' trip. A dual purpose trip is generally considered to be within the course of employment."[7]

In *Halford*,[8] the Kansas Court of Appeals stated:

> The work-related errand exception to the "going and coming rule" under workers compensation law extends to the normal risks involved in completing the task or travel, and the required perspective is to view the task or trip as unitary or indivisible, meaning an injury during any aspect thereof is compensable. So long as the employee's trip or task is an integral or necessary part of the employment, this exception applies to assure compensability for an injury suffered during any portion of such trip or task.

In *Taylor*,[9] the Supreme Court reversed the trial court's ruling that claimant had abandoned his trip to the doctor's office and had deviated from that trip by going to his son's service station and a restaurant, which removed him from the normal route. The Supreme Court majority found that the trial court's interpretation of the deviation was too narrow in finding claimant's injury did not arise out of and in the course of his employment.

The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the Administrative Law Judge exceeded his or her jurisdiction. K.S.A. 2010 Supp. 44-551(i)(2)(A). In addition K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the Administrative Law Judge has erred in his finding that the evidence showed a need for medical treatment is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an Administrative Law Judge to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

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[6] *Sumner* at 289.

[7] *Sumner* at 290; see also *Lohman v. State of Kansas,* Docket No. 1,027,057, 2006 WL 1933453 (Kan. WCAB June 13, 2006).

[8] *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, Syl. ¶ 6, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008); see also *Ridnour v. Kenneth R. Johnson, Inc.*, 34 Kan. App. 2d 720, 727, 124 P.3d 87 (2005), *rev. denied* 281 Kan. 1378 (2006).

[9] *Taylor v. Centex Construction Co.*, 191 Kan. 130, 379 P.2d 217 (1963).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

Claimant's accident occurred after he had returned home to retrieve his cell phone but before he had returned to the route he would take from respondent's branch office to his first job site. Although not required to use his cell phone for work, claimant was required to attain a sales revenue goal. Claimant used his cell phone to call prospective customers and to allow prospective customers to call him. Claimant also used his cell phone to maintain contact with respondent when the two-way radio system was not working.

The ALJ, citing *Taylor v. Centex Construction Co.*, determined that claimant did deviate from his employment, but the deviation was not substantial and, therefore, did not remove him from the course and scope of his employment. In addition, the fact that claimant used his cell phone for both business and personal purposes makes his trip home to recover his cell phone a dual purpose trip with a component of a work-related errand, which is compensable.

Whether claimant is in need of additional medical treatment or, instead, has reached maximum medical improvement is not an issue the Board has jurisdiction to decide on an appeal from a preliminary hearing Order. This is a determination the ALJ has the jurisdiction to make at a preliminary hearing.

CONCLUSION

(1) Claimant's accident arose out of and in the course of his employment with respondent.

(2) The ALJ did not exceed her jurisdiction in granting claimant medical benefits.

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[10] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2010 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 16, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William A. Wells, Attorney for Claimant
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge